



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-v-

MONTANA ENVIRONMENTAL
TRUST GROUP, LLC,

Defendant.

Cause No.: CV 98-3-H-CCL

ORDER

On January 10, 2010, this Court granted the parties' joint motion to substitute "Montana Environmental Trust Group, LLC," ("METG") for ASARCO as the named Defendant in this litigation. (Doc. 6 at 1.) METG was also substituted for ASARCO as a party to the 1998 Consent Decree, making METG liable for any tasks for which ASARCO would have been liable under that consent decree. (Doc. 6 at 2.)

Now before the Court comes ASARCO with a “Motion to Terminate the East Helena CAMU¹ Trust and to Distribute Remaining Trust Property” to ASARCO. The East Helena CAMU Trust provided the funding for the work required by the 1998 Consent Decree. ASARCO alleges *inter alia* that jurisdiction lies in this Court. The United States agrees and, indeed, also seeks affirmative relief by summary judgment ruling as a matter of law that the East Helena CAMU Trust has not been terminated. Under all the circumstances, exercise of this Court’s concurrent jurisdiction seems appropriate here.

This case has a long history related to the environmental cleanup operation at ASARCO’s lead smelter site in East Helena, Montana. Because the ASARCO lead smelter in East Helena, Montana, generated hazardous waste, ASARCO was obligated to abide by government regulations for treatment, storage, and disposal of hazardous waste. In 1998, EPA and ASARCO proposed the “East Helena Consent Decree,” wherein this Court approved the parties’ agreements for the

¹ “CAMU” stands for “corrective action management unit,” which is an engineered permanent waste disposal unit. (Doc. 10 n.7; Doc. 24 n.4.)

payment of costs and performance of environmental cleanup work under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 (“RCRA”), and the Federal Clean Water Act, 33 U.S.C. §§ 1251 to 1387 (“CWA”).

On October 16, 2007, ASARCO established an irrevocable trust in the amount of \$4,353,110.50 to provide funds to effectuate the 1998 Consent Decree. The funds in the Trust were to be used to pay for the East Helena Lead Smelter’s 2007 CAMU Phase 2 Project Cost Schedule, culminating in the placement of a Final Cap (at a preliminary budget cost for that final cap of \$972,724.05). This Trust Agreement named Dan Silver as Trustee. Today, there is \$1.2 million dollars remaining in the East Helena CAMU Trust, but the work of the Phase 2 Project is not yet complete because the waste disposal work is not finished and the final cap has not been designed, built, or installed. Despite the fact that the project is not complete, ASARCO now seeks the return of the \$1.2 million remaining in the Trust.

Backing up slightly in this chronology of events, in August 2005, ASARCO filed a petition for relief under Title 11 of the United States Bankruptcy Code with

the United States Bankruptcy Court for the Southern District of Texas. The United States filed with the Bankruptcy Court several Proofs of Claims under CERCLA² for various past and future response costs related to properties all around the country, including properties in Montana (including the East Helena Smelter site), as did the State of Montana. The United States also filed Supplemental Proofs of Claims with the Bankruptcy Court relating to the Montana properties that were protective filings which related specifically to ASARCO's obligations under the Montana consent decrees. (See Doc. 10-6, ¶¶ 34, 61 ("EPA and ASARCO have entered into RCRA Consent Decrees with regard to the . . . East Helena Facilities. ASARCO is liable for injunctive and compliance obligations that it is required to perform under RCRA, RCRA permits, and all work requirements under RCRA permits, consent decrees and administrative orders. It is the position of the United States that a proof of claim is not required to be filed for injunctive, compliance, and regulatory obligations and requirements

² Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. ¶¶ 9601 *et seq.* ("CERCLA").

under RCRA.”)

In 2009, in the bankruptcy proceeding, the parties entered into the “Montana Settlement Agreement,” which settled EPA’s Montana CERCLA claims against ASARCO in the bankruptcy proceeding for more than \$130 million. That agreement, called the “Montana Settlement Agreement,”³ provides that the Bankruptcy Court retains jurisdiction to interpret the Montana Settlement Agreement and to enforce compliance with that agreement, but it also provides that this Court retains concurrent jurisdiction with the Bankruptcy Court for enforcement of both the Custodial Trust (*i.e.*, the bankruptcy trust funds) and the parties’ obligations under the 1998 East Helena Consent Decree. (Doc. 10-2, ¶ 46.) The Montana Settlement Agreement also provided that ASARCO would be removed from the 1998 East Helena Consent Decree, and the bankruptcy Custodial Trustee, which is METG, would be substituted in for ASARCO as a

³ “Consent Decree and Settlement Agreement Regarding the Montana Sites,” entered in *In re ASARCO LLC, et al.*, Case No. 05-21207 (Chapter 11 Jointly Administered) (Bankr. S.D. Tex. 6/5/2009).

party to the 1998 East Helena Consent Decree. (Doc. 10-2, ¶ 19.) Finally, the Montana Settlement Agreement provided that the bankruptcy Custodial Trust will assume ASARCO's obligations for "the Montana Consent Decrees...." (Doc. 10-2, ¶ 23.) Essentially, METG now stands in ASARCO's shoes for all purposes under the 1998 East Helena Consent Decree and in this case.

On December 9, 2009, ASARCO's Plan of Reorganization became effective, and ASARCO transferred \$138.3 million in cash to Custodial Trust accounts in exchange for release from all of its environmental cleanup liability in the State of Montana, which amount was applicable to three sites in addition to the East Helena Lead Smelter. (Approximately \$100 million is designated for the cleanup at the East Helena Lead Smelter.) The EPA and ASARCO created the Montana Custodial Trust to receive this money.

ASARCO's position is that the \$100 million funded to the Montana Custodial Trust is designated for cleanup at the East Helena Lead Smelter, and so the CAMU Trust (also created to fund the cleanup at the East Helena Lead Smelter) is no longer needed, and any money remaining in that Trust ought to be

returned to the newly-reorganized ASARCO. ASARCO claims that if the money is not returned to it, EPA will receive a double-recovery.

EPA objects to the Motion to Terminate the CAMU Trust on the grounds that it settled all of its CERCLA claims regarding the East Helena Lead Smelter for \$100 million to be paid by ASARCO into the Montana Custodial Trust, not expecting any change in their previous agreement, *i.e.*, expecting that the CAMU Phase 2 Project costs, which are RCRA costs, would continue to be paid from an *irrevocable* trust (the East Helena CAMU Trust). The EPA asserts that the total cleanup costs for the East Helena Lead Smelter will exceed the funds of *both* Trusts, and just because it settled its East Helena CERCLA claims in Bankruptcy Court for \$100 million does not mean that the CAMU Trust money is not needed for the RCRA cleanup. Furthermore, the EPA asserts that nothing is stated in either the 2009 Montana Settlement Agreement or in the 2009 Montana Custodial Trust Agreement that references the East Helena CAMU Trust in any fashion. In other words, the EPA takes the position that its total claims exceed all funds currently available, and that the parties intended that the 2009 Montana Custodial

Trust provide funding in addition to the 2007 East Helena CAMU Trust. EPA states that it had no need to make a claim in the Bankruptcy Court for the RCRA costs covered by the 2007 CAMU Trust because the funding for that work was already guaranteed by the existence of the CAMU Trust, which is, of course, an irrevocable trust. EPA points out that the specific criteria for termination of the 2007 CAMU Trust have not been met. The EPA's claims submitted to the Bankruptcy Court were for cleanup costs for which no funding was otherwise yet available. The EPA points out that the work originally budgeted for payment by the CAMU Trust Agreement, Exhibit B "2007 CAMU Phase 2 Project Cost Schedule," is not yet complete because the final cap has not yet been placed. EPA objects to ASARCO's assertion that the 2009 Montana Custodial Trust actually covers the cleanup costs that are guaranteed by the 2007 East Helena CAMU Trust, when the 2009 Montana Custodial Trust Agreement does not even reference the CAMU Trust or provide for the termination of the CAMU Trust.

This Court is persuaded that the purpose of the East Helena CAMU Trust has not yet been fulfilled and the CAMU Trust is not otherwise terminated, given

that there is \$1.2 million remaining in the Trust and the Phase 2 Project has not been completed with the placement of a final cap over the hazardous waste storage unit. The CAMU Trust Agreement provides as follows regarding amendment and termination:

Section 14. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor [ASARCO/METG], the Trustee [Dan Silver] and the [EPA] Regional Administrator, or by the Trustee and the Regional Administrator if the Grantor ceases to exist.

Section 15. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 14, this Trust shall be irrevocable and shall continue until terminated by the written agreement of the Grantor [ASARCO/METG], the Trustee [Dan Silver], and the [EPA] Regional Administrator, or by the Trustee and the Regional Administrator, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

(Doc. 10-3, Exhibit B to ASARCO's Brief in Support.) No condition for amendment or termination has yet been satisfied.

Neither is the Court persuaded that the Montana Settlement Agreement provides for termination of the Trust. ASARCO's theory that the purpose of the

Montana Settlement Agreement is to take over the work of the CAMU Trust is without support in the document itself. The parties could have agreed in the Montana Settlement Agreement to terminate the CAMU Trust, but they did not do so. The parties could have agreed to offset ASARCO's obligation to fund the Custodial Trust with the funds already placed in the CAMU Trust, but they did not do so.

The circumstances presented by the pending motions do not require a legal interpretation of the Montana Settlement Agreement by the Court, because it is an integrated contract that is clear on its face. This Court finds that the purpose of the East Helena CAMU Trust has not been completed and the CAMU Trust has not properly been terminated.

The Court agrees with the United States that the Court could strike ASARCO's motion and require ASARCO to first file a motion to intervene. The Court also agrees that the relief requested by ASARCO could not have been granted without joining Trustee Dan Silver as a party to this suit. It would serve no useful purpose to delay these proceedings, however, while the Trustee is joined as

a party or a motion to intervene is briefed.

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party meets its burden of showing an absence of any genuine issues of material fact, the burden of production shifts to the non-moving party to show, as provided in Rule 56, specific facts evidencing a genuine need for trial. *T.W. Electric Service, Inc. V. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987) (citing Fed.R.Civ.P. 56(e)). The Court does not weigh conflicting evidence but draws all inferences in the light most favorable to the nonmoving party. *Id.* at 630-31.

This Court retains jurisdiction over the parties' obligations under the East Helena Consent Decree. The government's Motion for Summary Judgment, which seeks a ruling as a matter of law that the East Helena CAMU Trust has not been terminated, meets its initial burden of proof. The record is barren of any indication of termination of the East Helena CAMU Trust. Such termination is not set forth directly anywhere within the 69-page Montana Settlement Agreement. In


response, ASARCO fails to produce objective evidence of any indication or intent of the parties to terminate the East Helena CAMU Trust.

This matter has been fully briefed, neither party has requested a hearing, the Court finds that no hearing is required or would serve any purpose, and the Court is prepared to rule. Accordingly,

IT IS HEREBY ORDERED that ASARCO's Motion to Terminate the East Helena CAMU Trust (Doc. 9) is DENIED.

IT IS FURTHER ORDERED that the United States' Motion for Summary Judgment (Doc. 20) is partially GRANTED to the extent that this Court hereby adjudicates that the purposes of the East Helena CAMU Trust have not been fulfilled and the CAMU Trust has not been properly terminated and continues in effect. Let judgment enter.

Done and Dated this 10th of August, 2010.


CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE



Fw: Court says East Helena CAMU Trust has not been terminated.
Linda Jacobson to: Sarah Griffin

08/10/2010 02:46 PM

----- Forwarded by Linda Jacobson/R8/USEPA/US on 08/10/2010 02:46 PM -----

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Date: 08/10/2010 12:47 PM
Subject: Court says East Helena CAMU Trust has not been terminated.

Court's order attached. Give Chuck another week off.

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